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### Constitutional Law

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## VII. Departmental Separation of Governmental Powers [§§ 246–312]

### B. Executive Powers [§§ 255–258]

#### Topic Summary Correlation Table References

#### § 256. Limitations as respects judiciary

Executive officers cannot exercise<sup>[91]</sup> or usurp<sup>[92]</sup> judicial powers or functions, such as passing upon the constitutionality of legislation,<sup>[93]</sup> deciding whether a plaintiff or potential plaintiff has standing to maintain an action in court for judicial review of an agency's action,<sup>[94]</sup> amending or modifying court orders,<sup>[95]</sup> or sentencing criminals;<sup>[96]</sup> nor can they interfere with the courts,<sup>[97]</sup> or prevent them from exercising their inherent judicial functions.<sup>[98]</sup> On the other hand, it will not be held that an executive officer has performed a judicial function in performing his or her statutory duties which are executive in character.<sup>[99]</sup> Moreover, acts of the President<sup>[1]</sup> and other executive officers have been held not to constitute an exercise or usurpation of judicial power under many different circumstances.<sup>[2]</sup>

#### Observation:

The separation of powers doctrine requires administrative agencies in the executive branch to follow the law of the federal circuit whose courts have jurisdiction over a particular cause of action, and in the absence of a controlling decision by the United States Supreme Court, the respective Courts of Appeal express the law of that circuit.<sup>[3]</sup>

Although the executive branch may not force members of the judicial branch to perform duties that are not in keeping with their judicial roles and the independence of the judiciary, the power of the President, under a provision of a federal statute, to appoint members of the United States Sentencing Commission—at least three of whom must be federal judges—and to remove such members for neglect of duty, malfeasance, or other good cause, does not afford the President influence over the functions of the judicial branch of the Federal Government or undue sway over the members of that branch, in violation of the constitutional principles of separation of powers, because: (1) the President's power to appoint judges to other positions has never been considered sufficient to corrupt the integrity of the judiciary, and, in any case, the President's power of appointment to the Commission is limited by the requirement that judicial appointees be selected from a list submitted by the Judicial Conference of the United States; (2) the President has no power to affect the tenure and compensation of Article III judges as judges, so that even if the statute authorized the President to remove judges from the Commission at will, the President would have no power to coerce the judges in the exercise of their judicial duties; and (3) Congress has not given the President unfettered authority to remove Commission members, but has insulated such members from removal except for good cause.<sup>[4]</sup>

It has been held that the presence of a retired Supreme Court justice and an active circuit judge on a Presidential Commission to investigate organized crime does not violate the constitutional separation of powers doctrine, where the service of the judges was voluntary, judicial membership on the advisory commission did not prevent it from carrying out its duties, and participation by the judges did not disrupt the operation of the courts.<sup>[5]</sup> However, at least one court has taken a contrary position.<sup>[6]</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

The Court of Appeals and the District Court lacked jurisdiction to order discovery of or access to classified documents for the sake of defendant's clemency petition; clemency decision was within exclusive province of Executive Branch, and such a court order would violate the separation of powers doctrine. U.S. v. Pollard, 416 F.3d 48 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1590, 164 L. Ed. 2d 303 (U.S. 2006).

Federal Sentencing Guidelines, as modified by Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act provision known as Feeney Amendment, violated Separation of Powers Doctrine by effectively uniting power to prosecute and power to sentence within executive branch; Amendment gave executive branch effective control over Sentencing Commission by eliminating requirement that at least three of seven members had to be federal judges, and shift in control was exacerbated by other elements of Amendment including eliminating court's authority to grant third downward-departure point for acceptance of responsibility absent prosecutor's request, requiring de novo appellate review of most sentencing decisions, giving Attorney General power to create "fast-track" programs authorizing reductions in sentence in return for immediate guilty pleas, and requiring reporting to Attorney General of identity of any judge granting downward departure not requested by prosecutor. U.S. v. Detwiler, 338 F. Supp. 2d 1166 (D. Or. 2004).

California death penalty law does not violate the constitutional principle of separation of powers by delegating sentencing authority to the prosecutor; ultimate sentencing power remains at all times with the judicial branch. People v. Tafoya, 42 Cal. 4th 147, 64 Cal. Rptr. 3d 163, 164 P.3d 590 (2007).

The existence of prosecutorial discretion whether to seek the death penalty in a given case does not render the death penalty law unconstitutional. West's Ann. Cal. Penal Code § 190.2, People v. Dunkle, 36 Cal. 4th 861, 32 Cal. Rptr. 3d 23, 116 P.3d 494 (2005), cert. denied, 2006 WL 1059431 (U.S. 2006).

"Terri's law" which authorizes the Governor to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient in a persistent vegetative state violated separation of powers; the Act, as applied, resulted in an executive order that effectively reversed a properly rendered final judgment authorizing termination of life support and thereby constituted an unconstitutional encroachment on the power reserved for the independent judiciary, even though the District Court of Appeal had concluded that the order was subject to recall as long as the ward was alive. West's F.S.A. Const. Art. 2, § 3; Laws 2003, ch. 03-418, § 1 et seq. Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004), cert. denied, 125 S. Ct. 1086, 160 L. Ed. 2d 1069 (U.S. 2005).

Memorandum issued by the President of the United States, directing state courts to give effect to decision of the International Court of Justice holding that the United States had violated the Vienna Convention by failing to timely advise Mexican national awaiting execution in United States prison of his right to talk to a consular official after he had been detained, and ordering the United States to provide review and reconsideration of his conviction and sentence, violated separation of powers doctrine by intruding into domain of the judiciary and, thus, did not preempt state procedural rule establishing requirements for consideration of a subsequent application for writ of habeas corpus or require state court to review and reconsider Mexican national's Vienna Convention claim. Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), cert. granted, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (U.S. 2007).

President cannot dictate to the judiciary what law to apply or how to interpret the applicable law. (Per Keasler, J., with three Judges concurring and one Judge concurring in result). Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), cert. granted, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (U.S. 2007).

[END OF SUPPLEMENT]

[FN91] People ex rel. Consolidated Water Co. of Utica v. Maltbie, 275 N.Y. 357, 9 N.E.2d 961 (1937), probable jurisdiction noted, 58 S. Ct. 56 (U.S. 1937) and appeal dismissed, 303 U.S. 158, 58 S. Ct. 506, 82 L. Ed. 724 (1938).

[FN92] U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); People ex rel. Ingenito v. Warden and Agent of Auburn Prison, 267 A.D. 295, 46 N.Y.S.2d 72 (4th Dep't 1943), order aff'd, 293 N.Y. 803, 59 N.E.2d 174 (1944).

[FN93] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823, 9 Env'tl. L. Rep. 20517 (1979); State v. Sproles, 672 N.E.2d 1353 (Ind. 1996) (the Department of State Revenue has no authority to strike down a tax statute).

The Rhode Island Attorney General does not have authority to determine that legislation is unconstitutional, although the Attorney General may inform the court that, in his or her opinion, a statute is flawed. National Revenue Corp. v. Violet, 807 F.2d 285 (1st Cir. 1986).

[FN94] Sugarloaf Citizens' Ass'n v. Department of Environment, 344 Md. 271, 686 A.2d 605 (1996), reconsideration denied, 344 Md. 570, 689 A.2d 58 (1997).

[FN95] Chastain v. Chastain, 932 S.W.2d 396 (Mo. 1996), reh'g denied, (Nov. 19, 1996) (administrative modification of a child support does not permit an agency to review or enforce a trial court's support order, and thus it does not impinge on the judiciary's exclusive powers of judicial review and enforcement of prior orders).

The executive and legislative departments impermissibly interfere with judicial functions in violation of the state constitution when they purport to restrict or abolish a court's inherent powers, or when they purport to reverse, modify, or contravene a court order. Gray v. Commissioner of Revenue, 422 Mass. 666, 665 N.E.2d 17 (1996).

Modification of a death sentence to life imprisonment is a matter within the province of the Supreme Court, not the Attorney General. State v. Shepherd, 902 S.W.2d 895 (Tenn. 1995).

[FN96] Forbes v. Singletary, 684 So. 2d 173 (Fla. 1996) (sentencing is an obligation of the courts rather than the Department of Corrections).

[FN97] State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995).

[FN98] Gray v. Commissioner of Revenue, 422 Mass. 666, 665 N.E.2d 17 (1996); State ex rel. Karnes v. Dadisman, 153 W. Va. 771, 172 S.E.2d 561 (1970).

Judicial power under the Constitution extended to the President's claim of absolute privilege with respect to tape recordings and documents relating to conversations with his aides and advisors, subpoenaed by a special prosecutor for use in pending criminal prosecutions. U. S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

The executive branch may not decide for itself the question of whether an authority that is in question is exclusively committed to agency discretion; it is the function of the courts to interpret the Administrative Procedure Act concerning the right of citizens to obtain judicial review, not the function of executive agen-



cies to determine whether they wish to be reviewed by the courts or not. Diebold v. U.S., 961 F.2d 97 (6th Cir. 1992).

Separation of powers mandates that the judiciary remain independent of executive affairs and vice versa. U.S. v. Robertson, 45 F.3d 1423 (10th Cir. 1995), reh'g denied, 49 F.3d 671 (10th Cir. 1995) and cert. denied, 515 U.S. 1108, 115 S. Ct. 2258, 132 L. Ed. 2d 265 (1995) and cert. denied, 515 U.S. 1108, 115 S. Ct. 2259, 132 L. Ed. 2d 265 (1995) and cert. denied, 116 S. Ct. 133, 133 L. Ed. 2d 81 (U.S. 1995).

[FN99] People v. Superior Court (Alvarez), 14 Cal. 4th 968, 60 Cal. Rptr. 2d 93, 928 P.2d 1171 (1997), reh'g denied, (Mar. 12, 1997) (the action of a district attorney in filing an information is not the exercise of a judicial power or function).

[FN1] U.S. v. Williams, 15 F.3d 1356, 1994 FED App. 37P (6th Cir. 1994), reh'g and suggestion for reh'g en banc denied, (Apr. 4, 1994) and cert. denied, 513 U.S. 966, 115 S. Ct. 431, 130 L. Ed. 2d 344 (1994) and related reference, 43 F.3d 1473 (6th Cir. 1994) (the executive power to grant reprieves and pardons for offenses against the United States does not limit the power of the judiciary).

[FN2] Chas. T. Main Intern., Inc. v. Khuzestan Water & Power Authority, 651 F.2d 800 (1st Cir. 1981) (holding that the President did not divest federal courts of jurisdiction over claims against Iran by agreeing to a settlement requiring U.S. claimants to divert their claims to an international arbitration tribunal since he simply exercised his constitutionally based power to "settle" claims of U.S. nationals against a foreign state in the course of negotiating an end to an international crisis).

Prosecutorial discretion to seek the death penalty does not violate the constitutional principle of separation of powers by delegating sentencing authority to the prosecutor, as the ultimate sentencing power remains at all times with the judicial branch. People v. Arias, 13 Cal. 4th 92, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (1996), reh'g denied, (July 10, 1996) and cert. denied, 117 S. Ct. 2408, 138 L. Ed. 2d 175 (U.S. 1997).

Washington Initiative 593, the "three strikes law," does not violate the separation of powers doctrine on the theory that it transfers sentencing discretion from judges to prosecutors without providing standards for the exercise of that discretion. State v. Manussier, 129 Wash. 2d 652, 921 P.2d 473 (1996), reconsideration denied, (Oct. 24, 1996) and cert. denied, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (U.S. 1997).

A statute granting the warden of a prison authority to allow a defendant to participate in a youthful offender program did not violate the separation of powers doctrine; the statute did not authorize the warden to sentence or to alter a sentence; instead, the District Court retained discretion to reduce the sentence or to decline any sentence reduction following the defendant's successful completion of the program. Ellett v. State, 883 P.2d 940 (Wyo. 1994).

[FN3] Hyatt v. Heckler, 807 F.2d 376, 16 Soc. Sec. Rep. Serv. 52, Unempl. Ins. Rep. (CCH) ¶17092 (4th Cir. 1986), cert. denied, 484 U.S. 820, 108 S. Ct. 79, 98 L. Ed. 2d 41 (1987).

[FN4] Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

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Leahy, Mistretta v. United States: Mistreating the Separation of Powers Doctrine? 27 San Diego LR 209, January-February, 1990.

Welby, Mistretta v. United States: A Pragmatic Destruction of the Structural Separation of Powers Doctrine. 1 Widener J Pub L 431, 1992.

[FN5] Matter of President's Com'n on Organized Crime Subpoena of Scarfo, 783 F.2d 370 (3d Cir. 1986).

[FN6] Application of President's Com'n on Organized Crime, 763 F.2d 1191 (11th Cir. 1985).

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